AmBank (M) Bhd v Kamariyah bt Hamdan & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-03–56 OF 2010
JEFFREY TAN, LINTON ALBERT AND AZIAH ALI JJCA
21 JULY 2011

Civil Procedure — Third party proceedings — Notice — Appeal against decision of court below in striking out third party notice — Third party a legal firm — Legal firm gave advice to release loan — Advice resulted in losses and damages — Allegation that cause of action founded on negligence of third party's advice — Accrual of cause of action — Whether claims for contribution, indemnity, relief or other remedies statute barred

This was an appeal against the order of the court below, striking out the third party notice of the appellant ('the second defendant') against the respondents on the ground that whatever claims for contribution, indemnity, relief or other remedy against the respondent was statute barred. In the court below, the plaintiffs (who were not involved in the present appeal) claimed that the first defendant, who had an agreement ('the agreement') with them to develop their lands and the third, fourth and fifth defendants, the directors of the first defendant, had fraudulently charged the lands in favour of the appellant as security for loans granted by the appellant to the first defendant. The plaintiffs further contended that the appellant acted fraudulently or negligently in respect of the charge of the lands. Pursuant to the provisions of the agreement, the plaintiffs had granted a power of the attorney ('PA') to the first defendant. Under the PA, the plaintiff averred that the first defendant had no powers to charge the lands except 'upon the issuance of separate individual titles …' and that the appellant who had not ascertained the powers granted by the PA and/or the specific purposes for which the lands could be charged was fraudulent and/or negligent in relation to the charge that was registered in 1997. Subsequently, the plaintiffs sought to set aside the charge. The respondents in this appeal were partners of the firm of solicitors who prepared and presented the charge for registration and who advised the appellant to release the loan, which the appellant did. It was contended by the respondents and in the event accepted by the court below, that the cause of action of the appellant against the respondents was founded on negligence, that the alleged loss and damage were occasioned upon release of the loan on 1 September 1997, and that in line with the cases of *Melton v Walker and Stanger* 125 Sol J 861, *Costa v Georghiou & Ors* [1984] NLJR 82 and *DW Moore & Co Ltd v Ferrier* [1988] 1 All ER 400, the cause of action accrued on 1 September 1997.

Held, allowing the appeal and reinstating the third party notice:

(1) All the three cases were strictly between plaintiffs and defendants.

However, in the instant case, there was a third party. Another difference was that the action of the plaintiffs against the appellant was not by a client against a solicitor for negligence. The action of the appellant against the respondent was however by a client against a solicitor for indemnity which was founded on the alleged fact that the respondents advised the appellant to release the loan. Contrary to the finding of the court below, *Melton v Walker and Stanger*, *Costa v Georghiou & Ors* and *DW Moore & Co Ltd v Ferrier* were not the definitive word on the applicable law. The cause of action of the appellant only accrued when the plaintiff served the action on the appellant (see para 7).

(2) The appellant on 1 September 1997 could not have discovered whatever negligence on the part of the respondent by the exercise of any reasonable diligence. Indeed, there was no reason for the appellant to suspect negligence, as effectively the respondents had advised the appellant that the charge was a valid charge. The release of the loan only evinced that the appellant on 1 September 1997 could not have discovered that something could be amiss about the charge. The earliest that it could be said that the appellant should have suspected possible negligence in the preparation of the charge was when the appellant was served with the writ of summons dated 24 May 2000. Only then could it be said that the appellant should have discovered that the charge was under challenge. The said third party notice was issued within six years from the date when the material facts on which the third party notice was based ought to have been discovered by the appellant by the exercise of reasonable diligence (see para 21).

(3) The said third party notice was struck out on the authority of *Melton v Walker and Stanger*, *Costa v Georghiou & Ors* and *DW Moore & Co Ltd v Ferrler*, but without the benefit of the subsequent development in the law relating to negligence which would not support the finding that the cause of action accrued when the loan was released on 1 September 1997. Based on authorities, the cause of action against the respondents only accrued when the appellant was served with the writ of summons. The said third party notice was not statute barred (see para 24).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap perintah mahkamah bawahan, membatalkan notis pihak ketiga perayu ('defendan kedua') terhadap responden-responden atas alasan bahawa apa-apa tuntutan untuk sumbangan, indemniti, relief atau remedi lain terhadap responden telah luput masa. Di mahkamah bawahan, plaintif-plaintif (yang tidak terlibat dalam rayuan ini) mendakwa bahawa defendan pertama, yang mempunyai perjanjian ('perjanjian tersebut') dengan mereka untuk memajukan tanah-tanah mereka dan defendan-defendan ketiga, keempat dan kelima, pengarah-pengarah defendan pertama, yang telah secara fraud mencagarkan tanah-tanah tersebut menyebelahi perayu sebagai jaminan

untuk pinjaman-pinjaman yang diberikan oleh perayu kepada defendan pertama. Plaintif-plaintif selanjutnya berhujah bahawa perayu telah bertindak secara fraud atau cuai berhubung gadaian tanah-tanah tersebut. Menurut peruntukan-peruntukan perjanjian, plaintif-plaintif telah memberikan surat kuasa wakil ('SKW') kepada defendan pertama. Di bawah SKW, plaintif menegaskan bahawa defendan pertama tiada kuasa untuk mencagarkan tanah-tanah kecuali 'upon the issuance of separate individual titles …' dan bahawa perayu yang tidak menentukan kuasa yang diberikan oleh SKW dan/atau tujuan spesifik yang mana tanah-tanah tersebut boleh dicagarkan adalah berunsur fraud dan/atau cuai berhubung gadaian itu yang telah didaftarkan pada tahun 1997. Berikutan itu, plaintif-plaintif memohon untuk mengetepikan gadaian itu. Responden-responden dalam rayuan ini merupakan rakan-rakan kongsi firma peguamcara yang menyediakan dan mengemukakan gadaian untuk pendaftaran dan yang telah menasihatkan perayu untuk melepaskan pinjaman, yang telah dilakukan oleh perayu. Adalah dihujahkan oleh responden-responden dan sekiranya diterima oleh mahkamah bawahan, bahawa kausa tindakan perayu terhadap responden-responden adalah berasaskan kecuaian, bahawa kehilangan dan kerugian yang dikatakan telah disebabkan pelepasan pinjaman pada 1 September 1997, dan bahawa sejajar dengan kes-kes *Melton v Walker and Stanger* 125 Sol J 861, *Costa v Georghiou & Ors* [1984] NLJR 82 dan *DW Moore & Co Ltd v Ferrier* [1988] 1 All ER 400, kausa tindakan terakru pada 1 September 1997.

Diputuskan, membenarkan rayuan dan mengembalikan semula notis pihak ketiga:

(1) Ketiga-tiga kes adalah antara plaintif-plaintif dan defendan-defendan. Walau bagaimanapun, dalam kes ini, terdapat pihak ketiga. Satu lagi perbezaan adalah tindakan plaintif-plaintif terhadap perayu bukan oleh anak guam terhadap peguamcara kerana kecuaian. Tindakan perayu terhadap responden adalah bagaimanapun oleh seorang anakguam terhadap peguamcara kerana indemniti yang berasaskan atas fakta yang dikatakan yang mana responden-responden telah menasihati perayu untuk melepaskan pinjaman. Berbeza dengan penemuan mahkamah bawahan, *Melton v Walker and Stanger, Costa v Georghiou & Ors* dan *DW Moore & Co Ltd v Ferrier* tidak memberikan definisi perkataan berdasarkan undang-undang yang terpakai. Kausa tindakan perayu hanya terakru apabila plaintif menyampaikan tindakan ke atas perayu (lihat perenggan 7).

(2) Pada 1 September 1997, perayu tidak mungkin mendapati berlaku kecuaian di pihak responden melalui amalan apa-apa usaha yang munasabah. Sememangnya, tiada sebab untuk perayu mensyaki kecuaian, kerana responden-responden dengan berkesan telah menasihati perayu bahawa gadaian itu adalah gadaian yang sah. Pelepasan pinjaman hanya menunjukkan dengan jelas bahawa perayu

pada 1 September 1997 tidak mungkin mendapati terdapat suatu yang tidak kena mengenai gadaian itu. Paling awal ia boleh dikatakan yang perayu patut telah mengesyaki kemungkinan berlaku kecuaian dalam penyediaan gadaian adalah apabila perayu disampaikan writ saman bertarikh 24 Mei 2000. Hanya pada masa itu boleh dikatakan bahawa perayu patut telah mendapati yang gadaian itu dicabar. Notis pihak ketiga tersebut telah dikeluarkan enam tahun dari tarikh apabila fakta material menjadi asas notis pihak ketiga patut disedari oleh perayu melalui amalan usaha yang munasabah (lihat perenggan 21).

(3) Notis pihak ketiga tersebut dibatalkan berdasarkan autoriti *Melton v Walker and Stanger, Costa v Georghiou & Ors* dan *D W Moore & Co Ltd v Ferrier*, tetapi tanpa manfaat perkembangan dalam undang-undang berkaitan kecuaian yang tidak menyokong penemuan itu bahawa kausa tindakan yang terakru semasa pinjaman dilepaskan pada 1 September 1997. Berdasarkan autoriti-autoriti tersebut, kausa tindakan terhadap responden-responden hanya terakru apabila perayu menyampaikan writ saman itu. Notis pihak ketiga tersebut tidak luput masa (lihat perenggan 24).]

Notes

For cases on notice, see 2(4) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 9221–9224.

Cases referred to

AmBank (M) Bhd v Abdul Aziz bin Hassan & Ors [2010] 3 MLJ 784, CA (refd)
Cartledge v E Jopling & Sons Ltd [1963] AC 758, HL (refd)
Central Trust Co v Rafuse [1986] 2 SCR 147, SC (refd)
City of Kamloops v Nielsen (1984) 10 DLR (4th) 641; [1984] 2 SCR 2, SC (refd)
Costa v Georghiou & Ors [1984] NLJR 82 (folld)
DW Moore & Co Ltd and others v Ferrier and others [1988] 1 All ER 400; [1988] 1 WLR 26, CA (folld)
Forster v Outred & Co (a firm) [1982] 2 All ER 753, CA (refd)
Goh Kiang Heng v Hj Mohd Ali bin Hj Abd Majid [1998] 1 MLJ 615, HC (refd)
Knapp v Ecclesiastical Insurance Group plc and Smith [1998] PNLR 172, CA (refd)
Law Society v Sephton & Co [2006] 3 All ER 401; [2006] 2 AC 543, HL (refd)
Mat Abu bin Man v Superintendent, General Hospital, Taiping, Perak & Ors [1989] 1 MLJ 226, SC (refd)
Melton v Walker and Stanger 125 Sol J 861, Ch D (folld)
Schwebel v Telekes [1967] 1 OR 541 (refd)
United Merchant Finance Bhd v Majlis Agama Islam Negeri Johor [1999] 1 MLJ 657, FC (refd)
Wardley Australia Ltd v Western Australia (1992) 175 CLR 514, HC (refd)

Legislation referred to

Limitation Act 1953 s 6
Limitation Act 1939 [UK] s 26
Nova Scotia Companies Act [CAN] s 96(5)
Nova Scotia Statute of Limitations RSNS 1967 [CAN] c 168
Public Authorities Protection Act 1948 s 2(a)
Rules of the High Court 1980 O 16
Trade Practices Act 1974 [AU] s 82(2)

Benjamin John Dawson (Kingston Tan, HQ Kwong and Elaine Choong with him) (Heiley Hassan, Tan & Partners) for the appellant.
Vijay Raj (Skrine) for the respondents.

Jeffrey Tan JCA (delivering judgment of the court):

[1] This is an appeal against the order of the court below dated 9 February 2010, striking out the third party notice of the appellant (the second defendant below) against the respondents on the ground that whatever claims for contribution, indemnity, relief or other remedy against the respondent were statute barred.

[2] Briefly stated, the plaintiffs (who are not involved in this appeal) claimed that the first defendant, who had an agreement with them to develop their lands held under EMR 325 for Lot 713, EMR 294 for Lot 672, and EMR 1692 for Lot 678, all in the Mukim of Bakri, Muar ('the lands'), and the third, fourth and fifth defendants, who were directors of the first defendant, had fraudulently charged the lands in favour of the appellant as security for loans granted by the appellant to the first defendant (see amended statement of claim at pp 57–67 of the appeal record). The plaintiffs further contended that the appellant acted fraudulently or negligently in respect of the charge of the lands (see amended statement of claim at 67–72AR).

[3] Pursuant to the provisions of the aforesaid agreement, the plaintiffs had granted a power of the attorney dated 12 January 1994 ('PA') to the first defendant. The plaintiff averred that under the PA the first defendant had no powers to charge the lands except 'upon the issuance of separate individual titles …', and that the appellant who had not ascertained the powers granted by the PA and or the specific purposes for which the lands could be charged was fraudulent and or negligent in relation to the charge that was registered in 1997. The plaintiffs sought to set aside the charge.

[4] The respondents were partners of the firm of solicitors who prepared and

presented the charge for registration and who advised the appellant to release the loan, which the appellant released to the first defendant on 1 September 1997.

[5] It was contended by the respondents and in the event accepted by the court below, that the cause of action of the appellant against the respondents was founded on negligence, that the alleged loss and damage were occasioned upon release of the loan on 1 September 1997, and that in line with *Melton v Walker and Stanger* 125 Sol J 861, *Costa v Georghiou & Ors* [1984] NLJR 82, and *DW Moore & Co Ltd and others v Ferrier and others* [1988] 1 All ER 400; [1988] 1 WLR 26, the cause of action accrued on 1 September 1997 (see 20–22AR).

[6] In *Melton v Walker and Stanger*, the plaintiff alleged that the solicitors were instructed to draft an agreement to provide for the plaintiff and W to be equally liable for certain specified costs and tax. In the action by the plaintiff against W, the High Court held that the agreement did not have the effect of making the plaintiff and W equally liable for those costs and tax. Thereupon, the plaintiff filed action against the solicitors for negligence in drafting the agreement. Nourse J held that the damage was suffered and the cause of action was complete on 7 April 1967, when the agreement was executed. In *Costa v Georghiou*, Costa instructed the solicitors to incorporate rent review provisions in the sublease of factory premises. The required rent review provisions were not contained in the said sublease. Rather, the solicitors inserted those rent review provisions in the counterpart of the sublease. Costa could not enforce the rent review provisions by reason that they were not included in the sublease. Costa filed action against the solicitors. In response to the defence of limitation, Costal pleaded that the insertion amounted to concealed fraud and that therefore the solicitors should not be entitled to rely on limitation. Hirst J held that there was no concealed fraud and that the action was statute barred. And in *D W Moore & Co Ltd v Ferrier*, the plaintiffs agreed to allow F to join their business of insurance brokers. The plaintiffs asserted that they were advised by the solicitors that the covenant in the agreements dated 1971 and 1975 was sufficient to prevent F from engaging in business in competition. In 1980, F left the business. The plaintiffs discovered that the covenant was ineffectual to prevent F from establishing his own business. In 1985, the plaintiff filed action against the solicitors. The English Court of Appeal (Kerr, Neill and Bingham L JJ) held 'where a solicitor negligently drafted a contract the client suffered damage at the time when the contract was executed and not when the defect was discovered, since at the time of execution the client was entering into a contract which was of less commercial value than if the solicitor had not been negligent. Accordingly, the limitation period for bringing an action against the solicitor for negligence began to run from the time when the contract was executed and not from the time when the defect was discovered or

financial loss suffered. Since the agreements which the plaintiffs had executed in 1971 and 1975 were demonstrably of less commercial value, by reason of the defective restrictive covenants, than they would have been if those covenants had been adequately drafted, the plaintiffs had suffered actual damage capable of quantification at the date they executed the agreements, namely in 1971 and 1975 respectively, even though at those dates quantification of the damage suffered would have depended on an assessment of the chance of future financial loss due to F's future behavior' (quoted from [1988] 1 All ER 400). Neill LJ, who authored the main judgment, nonetheless enunciated that there is no presumption that on a solicitor's negligent advice damage occurred when the advice was acted on, and that it is a question of fact in each case whether actual damage has been established and when.

[7] All three latter cases were strictly between the plaintiffs and defendants. But in the instant case, there was a third party. Another difference was that the action of the plaintiffs against the appellant was not by a client against a solicitor for negligence. The action of the appellant against the respondent was however by a client against a solicitor for indemnity which was founded on the alleged fact that the respondents advised the appellant to release the loan. The advice of the respondents could only have been that it was in order to release the loan. The appellant averred that it relied on the advice of the respondents (see para 15 of the appellant's statement of claim). And the appellant must have accepted the advice of the respondents that the charge was in order. Without being so aware that the charge could be challenged, the appellant could not have known that loss would be occasioned when it released the loan on 1 September 1997. And without being so aware and without a claim to defend on 1 September 1997, the existence of whatever loss had not even been ascertained or ascertainable. Given so, the appellant could not have claimed for indemnity from the respondent on 1 September 1997. Could it therefore be plain and obvious that the third party notice of the appellant could not be sustained? Suffice it to say that contrary to the finding of the court below, *Melton v Walker and Stanger, Costa v Georghiou & Ors and D W Moore & Co Ltd and others v Ferrier and others* were not the definitive word on the applicable law. Indeed, our research suggests that the cause of action of the appellant only accrued when the plaintiff served the action on the appellant. We say so on the basis of the following two authorities on the date of accrual of a defendant's cause of action for indemnity against a third party.

[8] In *United Merchant Finance Bhd v Majlis Agama Islam Negeri Johor* [1999] 1 MLJ 657, the plaintiffs demanded but the defendants failed to refund certain fixed deposits. The plaintiffs applied for summary judgment. The High Court held that the defendants had succeeded in establishing bona fide triable issues. On appeal, the Court of Appeal found that the defendants had not raised any credible defence. On further appeal, the Federal Court granted the

defendants unconditional leave to defend. It transpired that the defendants had issued a third party notice on MUI Continental Insurance Sdn Bhd, seeking indemnity from the latter against the *Majlis*'s claim of RM1m. And in relation to that third party proceeding, the Federal Court per Mohamed Dzaiddin FCJ, as he then was, delivering the judgment of the court, observed:

> His Lordship (meaning the High Court) summed up his finding as follows ([1995] 4 MLJ 482 at p 492):
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> > From the facts, this is certainly not a plain and straight forward case. It is devious and crafty and a trial is the best solution (*Miles v Bull* [1968] 3 All ER 632. Put in another way, this is a complicated case and it is desirable that if the plaintiff is to get judgment it should be after a trial. This by itself constitutes 'some other reason' (*Bank fur Gemeinwirtschoft Aktiengesellschaft v City of London Garages* [1971] 1 WLR 149).
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> However, as a postscript, His Lordship noted that the defendants had issued a third party notice on MUI Continental Insurance Sdn Bhd seeking an indemnity from the latter against the *Majlis*'s claim of RM1m. In his view, the presence of the third party to the present action came within the ambit of 'some other reason' to warrant a trial. *With respect, we do not think this is correct because third party proceedings are independent proceedings between a defendant as plaintiff and a third party as defendant* (*Mat Abu bin Man v Medical Superintendent General Hospital, Taiping, Perak & Ors* [1989] 1 MLJ 226 (SC)). Secondly, the determination of the question in the third party proceedings has to await the determination of the issues in the plaintiff's action against the defendant (see *Ng Kim Hwa v Ng See Chow & Ors* [1993] 2 MLJ 155). (Emphasis added.)

[9] In *Mat Abu bin Man v Superintendent, General Hospital, Taiping, Perak & Ors* [1989] 1 MLJ 226, the Federal Court per Hashim Yeop Sani Ag CJ (Malaya), as he then was, was even more clear-cut on the date of accrual of a cause of action for indemnity. In *Mat Abu bin Man*, which concerned a motor accident, the motorcyclist died at the Taiping General Hospital of septicemia and gas-gangrene secondary to multiple fractures. The administrator of the deceased motorcyclist brought an action against the appellant. The appellant took out third party notices against the Superintendent of the Taiping General Hospital and the Government of Malaysia, claiming contribution and indemnity. The third parties denied that the appellant was entitled to contribution or be indemnified by them and also pleaded that the appellant's action against the third parties was statute barred by reason of s 2(a) of the Public Authorities Protection Act 1948. The learned judge ruled that the defence of limitation succeeded and dismissed the appellant's claim against the third parties. On appeal, the Federal Court held:

In our opinion the answer to the appeal before us lies in ascertaining the true object of s 10(1)(c) of our Civil Law Act. Like its English predecessor the provision gives a right to a tortfeasor to recover contribution from any other joint tortfeasor who has caused or contributed to the same damage.

We also do not think that a proceeding under O 16 of the Rules of the High Court 1980 is intended to be treated in the same way as an action between a plaintiff and a defendant.

Third-party proceedings for contribution should be regarded as independent of and separate from proceedings by a plaintiff against a defendant.

When a defendant is made liable to the plaintiff, he then has his right open against a third party to establish that he possesses a right to contribution or indemnity from the third party. *Time should begin to run from the date the defendant is held liable*. (Emphasis added.)

[10] And in *Goh Kiang Heng v Hj Mohd Ali bin Hj Abd Majid* [1998] 1 MLJ 615, Augustine Paul JC, as he then was, held that a cause of action only accrued when actual damage was ascertainable. There, the facts were as follows. On 21 January 1984, the plaintiff entered into a sale and purchase agreement with the owner of five plots of land for the purchase of the same. The defendant, an advocate and solicitor, witnessed the agreement. After settlement of the full purchase price, the plaintiff signed and delivered to the defendant on 30 January 1984 a memorandum of transfer to effectuate the transfer of title. In mid 1985, the plaintiff enquired about the transfer but received no response from the defendant. On 27 March 1991, the owner sold the land to a new owner. On 30 March 1991, the plaintiff filed action against the defendant, praying, inter alia, for specific performance and damages. Pleading that the plaintiff's claim was time-barred, the defendant filed an application to strike out the action. In ruling that the action was not statute barred, Augustine Paul JC held that the infringement was the non registration of the land in favour of the plaintiff, that the duty of the defendant to register the land in the name of the plaintiff was a continuing one until registration was effected, that the damage suffered by the plaintiff would be ascertainable only when it became impossible to register the land in his name in 1991 when it was conveyed to the new owner, that it was only at that point that the plaintiff could be said to have suffered any damage which is a necessary ingredient for an action founded on tort, that that would be the time when all the elements necessary to support the plaintiff's claim would be in existence in order to say that the cause of action had accrued, and that prior to that point of time, there would only be prospective loss and not actual damage which is necessary to sustain a claim for economic loss.

[11] Based on the aforesaid decisions of the apex court, time would begin to run from the date the appellant was held liable, and not when the loan was

released. But sad to say, all two aforesaid decisions of the apex court and even that of the High Court were not brought to the attention of the court below.

[12] Another leading decision that was not considered by the court below was *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514, where the respondent pleaded that Wardley and Wardley Australia Securities, who were merchant bankers, engaged in misleading and deceptive conduct in connection with the execution of an indemnity by the respondent in favour of the National Australia Bank against a facility granted by the National Australia Bank to Rothwetls Ltd, by reason of which the respondent suffered loss or damage. That pleading was introduced on 14 January 1991, that is more that three years after the execution of the indemnity on 26 October 1987 (s 82(2) of the Australian Trade Practices Act 1974 requires an action under sub-s (1) to be commenced within three years after the date on which the cause of action accrued). Issue arose as to whether the state's cause of action against *Wardley* accrued when the indemnity was granted or when it was called upon. The High Court of Australia held that the indemnifier suffers no loss until the contingency is fulfilled and accordingly time does not begin to run until that event.

[13] And *Wardley Australia Ltd v Western Australia* found approval with the House of Lords in *Law Society v Sephton & Co* [2006] 3 All ER 401; [2006] 2 AC 543, where the defendant firm of accountants had prepared reports and certified that a solicitor had complied with the solicitors' account rules, when in fact the solicitor had been misappropriating moneys held in his client account. Pursuant to a client's complaint, the law society's investigating accountant discovered the deficiency. Claims, the first being on 8 July 1996, were made on the solicitors' compensation fund maintained by the society. The society informed the defendant that the society would hold the defendant liable for payments made out of the compensation fund. The claim was issued on 16 May 2002. The defence pleaded that the claim was statute barred. A preliminary issue was tried as to the date of accrual of the cause of action. Ruling against the society, the judge held that the cause of action accrued before 16 May 1996. The Court of Appeal reversed that decision. On further appeal, the defendant contended that the society suffered damage in consequence of the accountant's negligence whenever the solicitor had misappropriated client's money after a negligent accountant's report had been delivered as that misappropriation gave the client a right to make a claim on the compensation fund and liability to such a claim was damage (paraphrased from [2006] 3 All ER 401). The House of Lords held that 'a contingent liability was not as such actionable damage until the contingency occurred. No actual damage would be sustained until the contingency was fulfilled and the loss became actual, and until that happen the loss was prospective and might never be incurred. In the instant case, by virtue of the terms of the compensation

fund rules, the solicitor's misappropriations gave rise to the possibility of a liability to pay a grant out of the fund, contingent upon the misappropriation not being otherwise made good and a claim in the proper form being made. Such a liability would be enforceable only in public law, by judicial review, but would still count as damage. But until a claim was actually made, no loss or damage was sustained by the compensation fund. It followed that the cause of action did not accrue in the society's favour against the defendant until it first received a claim on its fund from one of the solicitor's clients'.

[14] In relation to *Wardley*, the House of Lords first summarised the facts in *Wardley* and then observed as follows:

> In *Wardley* … the state was allegedly led by misrepresentations by Wardley about Rothwells Ltd, to grant to the bank an indemnity, which it would not otherwise have granted, in respect of a facility granted by the bank to Rothwells Ltd. The bank suffered loss and made a claim on the indemnity which the state settled by making a substantial payment. The issue arose whether the state's cause of action against Wardley accrued when the indemnity was granted or when it was called upon. The High Court held that the indemnity generated 'an executory and contingent liability' and that the state 'suffered no loss until that contingency was fulfilled and time did not begin to run until that event'. The High Court indicated that the contingency was fulfilled and the state incurred a liability to the bank 'if and when the bank's relevant 'net loss' was ascertained and quantified, subject to the making of a demand for payment by the bank'. In considering *Forster*'s case and other English decisions decided up to 1992, the majority said in their judgment, at p 531:
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> > It has been contended that the principle underlying the English decisions extends to the point that a plaintiff sustains loss on entry into an agreement notwithstanding that the loss to which the plaintiff is subjected by the agreement is a loss upon a contingency. For our part, we doubt that the decisions travel so far. Rather, it seems to us, the decisions in cases which involve contingent loss were decisions which turned on the plaintiff sustaining measurable loss at an earlier time, quite apart from the contingent loss which threatened at a later date.
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> They added that, if the English authorities stood for the wider proposition, they did not agree with them.

[15] The House of Lords further observed that the *Wardley*'s case was considered in *Knapp v Ecclesiastical Insurance Group plc and Smith* [1998] PNLR 172, and that Buxton LJ indorsed the rejection in the *Wardley*'s case of any proposition that 'the plaintiff necessarily suffers loss on entry to an agreement notwithstanding that the loss to which [he] is subjected by the agreement is loss upon a contingency: what is required is actual loss on entry, quite apart from the contingent loss threatened at a later date …

[16] Lord Mance pertinently pronounced that 'the rejection in the *Wardley* case and by Boxton LJ of any such proposition is consistent with the English

authorities discussed at … Since the state's liability through entering into the indemnity was purely contingent on whatever might happen to Rothwells and the bank facility and no particular state asset was depreciated in value on entry into of the indemnity, I think the same result as the High Court reached in the *Wardley* case should also be reached in this jurisdiction' (see p 568), and that there was 'attraction in the approach taken by the Australian High Court in the *Wardley* case, the effect of which is that unless and until a remote contingency eventuates the claimant Is not expected to issue proceedings which he would not normally issue or wish to issue until the point arrives' (see p 569).

[17] One particular case that exhaustively surveyed the various decisions of different jurisdictions was *Central Trust Co v Rafuse* [1986] 2 SCR 147, where the facts were as follows. The respondents were the solicitors for the purchasers of the capital of Stonehouse Motel and Restaurant Limited. The agreement of purchase and sale provided that the purchasers would obtain a mortgage on the Stonehouse property, and that the mortgage proceeds would be paid to the vendor towards the purchase price. One purchaser applied to the appellant's predecessor for a mortgage loan. The trust company retained the respondents to perform the mortgage transaction. The sale closed, a first mortgage on the Stonehouse property and a chattel mortgage were executed and the vendor was paid with funds that included the mortgage proceeds and the mortgage loan. respondent Cordon certified that the mortgage on the property formed a first charge on the property. Following default on the mortgage, the appellant instituted action for foreclosure against Stonehouse. Stonehouse and a judgment creditor, who intervened in the foreclosure action, raised the defence that the mortgage was void as being contrary to s 96(5) of the Nova Scotia Companies Act. The mortgage was declared to be void as being contrary to s 96(5). The appellant instituted action against the respondents for breach of contract and for negligence. The action was dismissed at trial, where the respondents were found as not negligent. The Court of Appeal found the respondent negligent but dismissed the appeal on the ground that the action was statute barred. On further appeal to the Supreme Court of Canada, the final issue was whether the action was statute barred (paraphrased from the report). The appellant contended (i) that if *Cartledge* were to apply, the action was yet not statute barred because the damage did not occur before the mortgage was declared void, and (ii) that if the cause of action does not arise before the damage is discovered or ought to have been discovered, the basis of the appellant's cause of action in tort was discoverable at the earliest in April or May 1977, when the validity of the mortgage was challenged.

[18] In relation to that final issue, the Supreme Court of Canada first pronounced that the 'limitation issue ultimately turns on whether the discoverability rule is to apply to the appellant's cause of action in tort' (see para 67 of the report). Apparently, the Court of Appeal had held that the cause of

action for negligence arose when negligence occurred and not when it was discovered or ought to have been discovered by the appellant with the exercise of reasonable diligence — 'In this case the negligence occurred when the solicitors gave the certificate of title. As found by the Supreme Court of Canada, the mortgage was void when it was delivered. The loss at that point was the face value of the defective mortgage' (per Jones JA, who relied on *Schwebel v Telekes* [1967] 1 OR 541, where it was held that the cause of action for negligence arose when the breach of duty occurred and not when it was discovered, and *Cartledge v E Jopling & Sons Ltd* [1963] AC 758, where the House of Lords acknowledged the injustice of the rule that a cause of action may arise for the purposes of the statute of limitations before the injured party has discovered or could have discovered the negligence).

[19] The Supreme Court of Canada answered that the mortgage, was void ab initio and 'that actual damage occurred when the respondents took it on December 31, 1968 because as a result the Nova Scotia Trust Company acquired no interest in the Stonehouse property as security for its loan. *Cf Forster v Outred' & Co (a firm)* .

[20] However in relation to the alternative submission on the limitation issue, the Supreme Court of Canada decidedly held in favour of the discoverability rule:

> 73. The question … is whether there is any reason why the judgment of the majority in *City of Kamloops v Nielsen* [1984] 2 SCR 2, which applied the discoverability rule … should not be followed …
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> 74. *Kamloops* involved a claim against a municipality for negligent failure to prevent the construction of a house with defective foundations. Section 738(2) of the Municipal Act provided that such an action must be brought within one year 'after the cause of such action shall have arisen', and s 739 provided that notice of the damage must be given to the municipality within two months 'from and after the date on which such damage was sustained'. Counsel for the municipality conceded that time began to run under both sections from the date the plaintiff actually discovered the damage or ought to have discovered it by the exercise of reasonable diligence. The issue was when he should have discovered it. The British Columbia Court of Appeal accepted this view of the law, citing *Sparham-Souter v Town and Country Developments (Essex) Ltd* [1976] QB 858 (CA), in support of the discoverability rule.
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> 75. Limitation of actions was not an issue when the appeal in *Kamloops* was argued in this court but after the decision of the House of Lords in *Pirelli General Cable Works Ltd v Oscar Faber & Partners* [1983] 2 AC 1, the court called for written submissions on the question. In *Pirelli*, the House of Lords held that the date of accrual of a cause of action in tort for damage caused by the negligent design or construction of a building was the date when the damage came into existence, and not the date when the damage was discovered or should have been discovered by the exercise of reasonable diligence. Cartledge was applied and Sparham-Souter

disapproved on this issue. As in *Cartledge*, the House of Lords acknowledged the injustice of the established rule but was of the opinion that it could only be changed by legislation. In *Cartledge*, the House of Lords attached particular importance to s 26 of the Limitation Act 1939, which provided that in certain cases of fraud and mistake 'the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it', as indicating the limited application to be given to the discoverability rule. In *Pirelli*, which involved an action against engineers for negligence with respect to the design of a chimney, the House of Lords had the further expression of legislative intent reflected in the amendment made by the Limitation Act 1963 to remedy the injustice demonstrated by *Cartledge* in cases of personal injury. Lord Fraser of Tullybelton said at p 14 that the amendment of 1963, confined as it was to personal injury cases, indicated that 'Parliament deliberately left the law unchanged so far as actions for damages of other sorts was concerned'. Both Lord Fraser and Lord Scarman, however, adverted to the more general reason for leaving such an important change in the law affecting the limitations of actions to the legislature: the inability of the courts to provide a satisfactory scheme for the accommodation of the competing interests, including the provision of an outside limit or 'final longstop date', as Lord Fraser referred to it. Lord Fraser put the general objection to the judicial introduction of the discoverability rule as follows at p 19:

> Postponement of the accrual of the cause of action until the date of discoverability may involve the investigation of facts many years after their occurrence — see, for example, *Dennis v Charnwood Borough Council* [1983] QB 409 — with possible unfairness to the defendants, unless a final longstop date is prescribed, as in ss 6–7 of the Prescription and Limitation (Scotland) Act 1973. If there is any question of altering this branch of the law, this is, in my opinion, a clear case where any alteration should be made by legislation, and not by judicial decision, because this is, in the words of Lord Simon of Glaisdale in *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443 , 480: 'a decision which demands a far wider range of review than is available to courts following our traditional and valuable adversary system — the sort of review compassed by an inter departmental committee'. I express the hope that Parliament will soon take action to remedy the unsatisfactory state of the law on this subject.

Lord Scarman spoke in a similar vein as follows at p 19:

> It is tempting to suggest that in accordance with the *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234, the House might consider it right to depart from the decision in *Cartledge*. But the reform needed is not the substitution of a new principle or rule of law for an existing one but a detailed set of provisions to replace existing statute law. The true way forward is not by departure from precedent but by amending legislation. Fortunately reform may be expected, since the Lord Chancellor has already referred the problem of latent damage and date of accrual of cause of action to his law reform committee.

76. These considerations were obviously before the court in *Kamloops*, yet in spite of them the majority chose to apply the discoverability rule to s 738(2) of the Municipal Act. While noting the importance attached in *Cartledge* to s 26 of the Limitation Act 1939, they did not suggest that *Cartledge* and *Pirelli* were

distinguishable because of the particular legislative context in *Kamloops*. Indeed, it is questionable whether they were distinguishable on that basis. While s 738(2) was in force, prior to its repeal and replacement by s 16 of the Limitations Act SBC 1975, c 37, which makes express provision for the discoverability rule and an outside limit, the Statute of Limitations RSBC 1948, c 191, afforded a similar basis for an argument as to legislative intent in s 38, which provided that the right of action for the recovery of any land or rent of which a person may have been deprived by concealed fraud 'shall be deemed to have first accrued at and not before the time at which such fraud shall or with reasonable diligence might have been first known or discovered'. There is a similar provision in s 28 of the Nova Scotia Statute of Limitations RSNS 1967, c 168. Although Wilson J, who delivered the judgment of the majority in Kamloops, did not comment explicitly on the opinion that the introduction of the discoverability rule should be left to legislative rather than judicial decision, it is an obvious implication of her reasons and conclusion that she disagreed with the views on this question expressed in *Cartledge* and *Pirelli*. She appears to have been led to this conclusion essentially by the acknowledged injustice of the rule applied out of judicial restraint in those cases. Referring to *Pirelli*, she said at p 40:

> But perhaps the most serious concern is the injustice of a law which statute-bars a claim before the plaintiff is even aware of its existence. Lord Fraser and Lord Scarman were clearly concerned over this but considered themselves bound by *Cartledge*. The only solution in their eyes was the intervention of the legislature.
>
> This court is in the happy position of being free to adopt or reject *Pirelli*. I would reject it. This is not to say that Sparham-Souter presents no problem. As Lord Fraser pointed out in Pirelli the postponement of the accrual of the cause of action until the date of discoverability may involve the courts in the investigation of facts many years after their occurrence. *Dennis v Chamwood Borough Council* [1982] 3 All ER 486, is a classic illustration of this. It seems to me, however, to be much the lesser of two evils.

[21] With that, the Supreme Court of Canada pronounced 'that the judgment of the majority in *Kamloops* laid down a general rule that a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence, and that that rule should be followed and applied to the appellant's cause of action in tort against the respondents under the Nova Scotia Statute of Limitations RSNS 1967, c 168. There is no principled reason, in my opinion, for distinguishing in this regard between an action for injury to property and an action for the recovery of purely financial loss caused by professional negligence, as was suggested in *Forster v Outred & Co (a firm)* [1982] 2 All ER 753, at pp 765–66. Since the respondents gave the Nova Scotia Trust Company a certificate on January 17, 1969 that the mortgage was a first charge on the Stonehouse property, thereby implying that it was a valid mortgage, the earliest that it can be said that the appellant discovered or should have discovered the respondents' negligence by

the exercise of reasonable diligence was in April or May 1977 when the validity of the mortgage was challenged in the action for foreclosure. Accordingly the appellant's cause of action in tort did not arise before that date and its action for negligence against the respondents is not statute barred'.

[22] Likewise, in the instant case, the appellant on 1 September 1997 could not have discovered whatever negligence on the part of the respondent by the exercise of any reasonable diligence. Indeed, there was no reason for the appellant to suspect negligence, as effectively the respondents had advised the appellant that the charge was a valid charge. And the release of the loan only evinced that the appellant on 1 September 1997 could not have discovered that something could be amiss about the charge. The earliest that it could be said that the appellant should have suspected possible negligence in the preparation of the charge was when the appellant was served with the writ of summons dated 24 May 2000. Only then could it be said that the appellant should have discovered that the charge was under challenge. On 28 October 2005, the appellant applied for leave to issue the said third party notice, which leave was granted on 2 January 2006. On 20 January 2006, the said third party notice was issued. Evidently, the said third party notice was issued within six years from the date when the material facts on which the third party notice was based ought to have been discovered by the appellant by the exercise of reasonable diligence.

[23] We were invited to consider *AmBank (M) Bhd v Abdul Aziz bin Hassan & Ors* [2010] 3 MLJ 784, where the appellant bank had granted a loan to MYT Builders Sdn Bhd. The security was a third party assignment of land known as Lot 465 which was part of Lot 57436 that was registered in the name of Majlis Bandaraya Ipoh ('MBI'). By a power of attorney, MBI had authorised a developer to enter into contracts of sale in respect Lot No 57436, the developer had entered into sale and purchase agreement with the assignor in respect of Lot 465. The respondents, a firm of solicitors, were instructed by the respondents to prepare the loan documentation including the third party assignment. After execution of the third party assignment dated 6 April 1999, the appellant released the loan to the borrower. Sometime in November 2000, the borrower defaulted on the loan. The appellant then sought to enforce the third party assignment by way of a private auction. But the consent of MBI for the sale could not be obtained. For reasons best known to the appellant, the action of the appellant against the MBI for that consent was withdrawn. Thereafter, the appellant filed action against the respondents on 17 March 2006. Inter alia, the appellant alleged that the respondents were negligent, in that they had not advised the appellant that the assignor did not have a good title to Lot 465. The High Court struck out the claim on the ground that it was statute barred. On appeal, the sole issue was whether the cause of action was brought after the expiration of six years from the date in which the cause of

action in contract or tort accrued. Dismissing the appeal, the Court of Appeal held (i) that the only test to ascertain limitation is housed in s 6 of the Limitation Act, regardless of whether the plaintiff discovers the damage, (ii) that a cause of action in contract accrued on the date of the breach, and (iii) that cause of action in tort accrued when the appellant suffered damage, that is when the third party assignment was executed on 6 April 1999.

[24] All except that in view of the aforesaid decisions of the apex court on the date of accrual of the cause of action, and the discoverability rule as espoused and or endorsed in *Wardley, Central Trust,* and *Law Society*, we must respectfully decline to defer to the ruling that time would run regardless of whether damage was or could be discovered.

[25] The said third party notice was struck out on the authority of *Melton v Walker and Stanger, Costa v Georghiou & ors* and *DW Moore & Co Ltd v Ferrier*, but without the benefit of the subsequent development in the law relating to negligence which would not support the finding that the cause of action accrued when the loan was released on 1 September 1997. Rather, based on all the authorities we have cited and relied upon, we would say that the cause of action against the respondents only accrued when the appellant was served with the writ of summons. The said third party notice was not statute barred.

[26] For these reasons, we unanimously allow this appeal, and reinstate the third party notice.

Appeal allowed and third party notice reinstated.

Reported by Afiq Mohamad Noor